No. 492 206.

Supreme Court of the United States

PETITION FOR CERTIORARI.

CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION,
Petitioner,

versus

WILLIAM H. DENSON and ROSA E. DENSON,
Respondents.

Petition for Certiorari to Circuit Court of Appeals, Fifth Circuit.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1901.

EX PARTE CHATTANOOGA NATIONAL BUILDING & LOAN ASSOCIATION,

PETITIONER.

Petition for Writ of Certiorari Requiring the Circuit Court of Appeals for the Fifth Circuit to Certify to the Supreme Court for its Review and Determination in the case of William H. Denson and wife, Rosa E. Denson, Appellants, v. Chattanooga National Building & Loan Association, Appellee.

To the Honorable the Supreme Court of the United States:

The petition of the Chattanooga National Building & Loan Association respectfully shows to this Honorable Court as follows:

I.

Your petitioner is a corporation chartered and organized under the laws of the State of Tennessee. Petitioner was organized under the general corporation laws of the State of Tennessee, and was granted and has, under its charter and the laws aforesaid, the power and authority to lend its funds to its stockholders on such terms and conditions and in such manner and under such regulations as may be prescribed by its constitution and by-laws, such loans to be secured by real estate; and in order to determine which one of the stockholders shall receive the loan, where there are a number simultaneously applying for it, petitioner's board of directors is authorized and required by the statutes of Tennessee aforesaid, and by petitioner's charter, to loan the funds in its treasury either in open meeting, or by action on written application and bids, at a rate of interest not in conflict with the laws of the State of Tennessee, to the stockholder or stockholders who will bid the highest premium for the privilege of obtaining such loan; the premium so bid to be repaid by the borrower in regular weekly or monthly installments, not as a part of the loan or as interest, but as a means of determining the right, as among competing stockholders, to obtain the loan. The statutes aforesaid require and prescribe that the stockholder who shall bid the highest premium for

the preference or priority shall be entitled to a loan out of the funds in the treasury to the extent of not more than two hundred dollars on each share of stock held by him, on condition, however, that he shall give good and approved security for the repayment of the money so borrowed. The home office and principal place of business of petitioner is, and has been continuously since its organization, in the city of Chattanooga, Tennessee.

II.

The said William H. Denson and wife, Rosa E. Denson, were, on the dates of each of the transactions hereinafter stated, citizens of the State of Alabama and residents of the city of Gadsden, in said State.

III.

On the 25th day of April, 1895, and prior thereto, petitioner had no local office or place of business, or resident agent, in the State of Alabama, and had done no business in that State except that it had in its employ a traveling soliciting agent named Kennedy, whose business it was to solicit subscriptions to petitioner's stock, and to submit applications for loans from petitioner. It had, however, in contemplation of doing business and establishing an agency in Alabama, paid the tax or license fee required under the laws of the State of Alabama from foreign corporations proposing to do business in that State, but had not complied with certain provisions of the Alabama laws hereinafter set forth, with reference to designating a place of business, and an authorized agent, in said State. Petitioner's failure to comply with these requirements was due to the fact that its agents and officers were ignorant of them; and as soon as they learned of said requirements, which was some months after the transactions to be hereinafter set forth took place, they promptly complied with them.

IV.

On the 25th day of April, 1895, the said William H. Denson, at his home in Gadsden, Alabama, signed a written application for fifty shares of petitioner's stock, and in said application agreed to abide by all the by-laws, rules and regulations of the petitioner; and this written application was delivered by said Denson to petitioner's said traveling soliciting agent Kennedy, who was in Gadsden at that time, by whom the same was forwarded to the petitioner at his home office in the city of Chattanooga aforesaid. In accordance with said application, said stock was duly issued at petitioner's home office and a certificate representing the same was sent by petitioner to said Kennedy, who delivered it to the applicant Denson. The purport and substance of the

recitals in said certificate was that the said Denson had subscribed for and was the owner of fifty shares of stock in the petitioner, on which he agreed to pay to petitioner sixty cents monthly on each share, until such share should mature or be withdrawn, which payments should be made at the home office of petitioner provided, however, that the members in any town might elect a local treasurer and make payments to him for transmission to the home office, in which event the local treasurer would be the agent of the members and not of petitioner. Said certificate was issued and dated at Chattanooga, Tennessee, on the 23rd day of May, 1895.

V.

On the 25th day of April, 1895, the same day on which he applied for the stock aforesaid, the said William H. Denson also made and signed a written application, addressed to petitioner's President and Board of Directors at Chattanooga, Tennessee, in and by which he stated that he owned fifty shares of petitioner's stock, on which he desired a loan of $2,500, and offered a premium of $2,500 for said loan, and proposed to secure said loan and premium by a mortgage or deed of trust on certain real estate in Gadsden, Alabama, described in said application. He further stated in said application, that he wanted said loan for the purpose of removing encumbrances on said real estate and to pay debts; that the value of said real estate was $9,000; that he would assign insurance to the amount of $3,000 as additional security for said loan, and would pay attorney's fees for investigating the title to said real estate, and the expense of recording the deed of trust which he proposed to give and other necessary documents. This application was delivered by said Denson to petitioner's said soliciting agent at the same time that the application for stock was delivered, and was forwarded to petitioner by said soliciting agent at the same time.

VI.

The said Denson, having become a stockholder in petitioner in the manner hereinbefore set forth, his said application for a loan was submitted to petitioner's Board of Directors, along with other similar applications, at its home office in Chattanooga, Tennessee, at a stated meeting; and the bid of said Denson for said loan being the highest that was offered for the sum of money which he desired, and the sum of money for which he applied being in the treasury subject to loan, and the security offered by him being approved, said Denson became and was entitled to said loan under the terms and provisions of the statutes of Tennessee governing petitioner, and of its charter and by-laws; and his said application was granted and the loan to him was directed to be made. There-

upon a note and deed of trust were prepared at petitioner's home office aforesaid, to be signed by said Denson, evidencing said loan and the contract for the repayment thereof, which note and deed of trust were sent by petitioner to its said soliciting agent, and at the same time a check for the amount to be loaned said Denson was drawn by petitioner on the Chattanooga National Bank of Chattanooga, Tennessee, against funds which petitioner had on deposit in said Bank, and this check was forwarded by petitioner to one D. P. Goodhue, of Gadsden, Alabama, with instructions to him to deliver the same to said Denson, when Denson should execute and deliver said note and deed of trust. Petitioner had no money at this time on deposit in the city of Gadsden or the State of Alabama. The said Denson duly executed said note and deed of trust, his wife Rosa E. Denson joining him in the execution of the latter, and both were sent by mail to petitioner at Chattanooga, Tennessee; and the check aforesaid was cashed for said Denson by the First National Bank of Gadsden, Alabama, by which the check was subsequently transmitted to its correspondent at Chattanooga, Tennessee, and there paid on presentation, by the Bank on which it was drawn. The note given by said Denson as aforesaid was payable, by its terms, at the home office of petitioner, in Chattanooga, Tennessee; and it stipulated that "It is further understood that this note is made with reference to and under the laws of the State of Tennessee." Said note was dated at Chattanooga, Tennessee, on June 10th, 1895, but both it and the deed of trust aforesaid were in fact executed in Gadsden, Alabama.

VII.

The note aforesaid recited that it was given for money borrowed on fifty shares of stock in petitioner, and stipulated that if the said Denson should promptly pay the monthly interest on the $2,500 borrowed, and the monthly payments on said shares of stock until the stock became fully paid in and of the value of $100 per share, then upon the surrender of said stock to petitioner said note should be deemed fully paid and cancelled. But it was further stipulated that if said Denson should fail to pay all taxes and insurance premiums on the property covered by his deed of trust aforesaid when the same became due and payable, or if he should make default in payment of the monthly interest on his loan, or the monthly dues on his stock, or any fines that might be assessed against him in accordance with the rules and by-laws of the petitioner, for a period of six months after such payments should become due, then, at the option of petitioner, the whole indebtedness evidenced by said note, including any taxes and insurance premiums paid by petitioner, should at once become due and payable, and a foreclosure of the mortgage given to secure

payment of said note might be had and enforced; and in that event, the said Denson agreed to pay reasonable attorney's fees or commission charges for collecting any amount that might be due petitioner.

VIII.

The said Denson continued to make the monthly payments on his stock aforesaid, together with interest on the money loaned him, up to and including the payment due in August, 1896; after which time he ceased, and refused, to make any further payments; and he also failed and refused to pay the taxes and insurance premiums on the property covered by his deed of trust aforesaid as he had expressly contracted and agreed to do; and petitioner was obliged, in order to protect its security, to pay the sum of $45 for insurance premiums and $223.84 for taxes on said property. Thereupon petitioner elected to and did declare the whole indebtedness evidenced by said note, including the taxes and insurance premiums paid by it as aforesaid, due and payable; and afterwards, to wit, on the 25th day of August, 1899, petitioner filed an original bill in equity in the Circuit Court of the United States for the Southern Division of the Northern District of Alabama against said William H. Denson and Rosa E. Denson, setting forth in substance the facts hereinbefore detailed, and praying for a decree against the said William H. Denson for the amount due on said note, and also for the amounts paid by petitioner for taxes and insurance premiums as hereinbefore set forth, and for attorneys' fees as stipulated in said note, and for a foreclosure of the mortgage or deed of trust aforesaid for payment of the entire amount due petitioner. The said Denson and wife answered said bill, and set up various defenses thereto; but on the hearing of the cause in the Circuit Court they abandoned all of said defenses except that petitioner was a foreign, or non resident, corporation; that all the transactions and contracts set out in the bill had been had and made in the State of Alabama; and that at the time said money was loaned, and said note and mortgage were executed, petitioner had not complied with or performed the conditions prescribed by the constitution and statutes of Alabama as prerequisite to the right of any foreign corporation to do business in that State; that therefore the aforesaid transactions and contracts were utterly void and unenforcible; and that for that reason petitioner was not entitled to the relief sought, or to any relief under its said bill.

IX.

The laws of Alabama referred to and relied on in said answer are as follows:

"No foreign corporation shall do any business in this State

without having at least one known place of business and an authorized agent or agents therein; and such corporation may be sued in any county where it does business by service of process upon an agent anywhere in this State." Const. Ala., Art. 14, Sec. 4.

"Every corporation not organized under the laws of this State shall, before engaging in or transacting any business in this State, file an instrument of writing, under the seal of the corporation and signed officially by the president and secretary thereof, designating at least one known place of business in this State and an authorized agent or agents residing thereat; and when any such corporation shall abandon or change its place of business as designated in such instrument, or shall substitute another agent or agents for the agent or agents designated in such instrument of writing, such corporation shall file a new instrument of writing as herein provided, before transacting any further business in this State." Code Ala. 1896, Sec. 1316.

"It is unlawful for any foreign corporation to engage in or transact any business in this State before filing the written instrument provided for in the two preceding sections; and any such corporation that engages in or transacts any business in this State without complying with the provisions of the two preceding sections shall, for each offense, forfeit and pay to the State the sum of one thousand dollars."

"It is unlawful for any person to act as agent or transact any business, directly or indirectly, in this State, for or on behalf of any foreign corporation which has not designated a known place of business in this State and an authorized agent or agents residing thereat, as required in this article; and any person so doing shall, for each offense, forfeit and pay to the State the sum of five hundred dollars." Code Ala. 1896, Secs. 1318, 1319.

X.

The cause aforesaid came on for final hearing before the Hon. Chas. Swayne, Judge, etc., on the 6th day of October, 1900; whereupon it was adjudged and decreed that petitioner was entitled to have and recover of said William H. Denson the sum of $2,841.15, which was adjudged to be the aggregate of the amount due on said note and the taxes and insurance premiums paid by petitioner as aforesaid, and the further sum of $200 as attorney's fees, as stipulated in said note, the Court adjudging that the sum of $200 was a reasonable attorney's fee; and unless said sums, amounting in all to the sum of $3,041.15, together with interest thereon from the date of the decree, and all costs, were paid within ninety days from the date of said decree, the Court further decreed that the

real estate described and conveyed in said mortgage or deed of trust should be sold for payment of the same.

XI.

From the decree aforesaid the defendants appealed to the Circuit Court of Appeals for the Fifth Circuit, and in their assignments of error, briefs and argument in said Court of Appeals, defendants relied and insisted solely on the proposition that the contract sought to be enforced was illegal because of petitioner's failure to comply with the Alabama laws hereinbefore set forth. Said cause came on for trial in said Circuit Court of Appeals, before the Hon. Don A. Pardee, the Hon. A P. McCormick, and the Hon. D. D. Shelby, Circuit Judges, and an opinion was duly rendered therein on the 16th day of April, 1901, in and by which it was held that the contract sought to be enforced by petitioner was illegal and unenforcible by reason of petitioner's failure to comply with the aforesaid constitutional and statutory requirements of the State of Alabama; and the decree of the Circuit Court in the cause was reversed and the cause was remanded to that Court with instructions to dismiss petitioner's bill.

On the 8th day of May, 1901, within the time allowed by the rules of the Court, petitioner filed in said cause a petition to rehear; which, on the first day of June, 1901, was dismissed and disallowed by the Court without an opinion.

A certified copy of the entire record in said cause in the said Circuit Court of Appeals is herewith furnished, and hereto annexed, as part of this application, in conformity with Rule 37 of this Honorable Court, and the same is marked Exhibit "A."

XII.

Petitioner is advised and respectfully represents that the said judgment of the Circuit Court of Appeals is erroneous, and that this Honorable Court should require the said cause to be certified to it for its review and determination under and in conformity with the provisions of the Sixth Section of the Act of Congress entitled: "An Act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891. The jurisdiction of the United States Circuit Court in said cause was dependent entirely upon the opposite parties to the suit or controversy being citizens of different States, and therefore the judgment and decree of the said Circuit Court of Appeals is final, subject only to the power and authority of this Honorable Court to review the same by writ of certiorari, as provided in the sixth section of the act aforesaid.

XIII.

The contentions of petitioner made in said cause in the Circuit Court of Appeals, and here insisted on, are among others:

1. That the contracts sued on did not involve any doing of business by petitioner in the State of Alabama; but that the said Denson's contract of subscription for stock, and his contract to repay the loan to him, were made in the State of Tennessee, where his applications were considered and granted, where his note was made payable, and where the money loaned him was paid by petitioner, in accordance with his order.

2. That if the presence of petitioner's soliciting agent Kennedy in the State of Alabama was a doing of business by petitioner in that State—although it was insisted, under the authority of Beard v. The Union and American Publishing Co., 71 Ala. 60, that such was not the case—yet the contract sued on was not made by said agent or in the State of Alabama, and even if petitioner violated the laws of Alabama in sending its soliciting agent into that State, that fact would not affect or prevent the enforcement by it of a contract made by it in the State of Tennessee with a citizen of Alabama.

3. That the issuance of stock by petitioner to said Denson, which took place in the State of Tennessee, gave him a vested right to a loan, on compliance with the prescribed conditions, which right he could legally enforce against petitioner; and that the State of Alabama could not forbid the performance by petitioner of its lawful contracts.

4. That the State of Alabama had no right or power to forbid the making by its citizens of contracts outside the State and with citizens of other States, and that it had not assumed to do so.

The questions aforesaid, and other questions involved in the case are, as petitioner is advised, of great gravity and importance; and especially is it important that there should be uniformity in the decisions on such questions among the different State and Federal Courts. Yet, instead of being certain and uniform, the decisions on all of said questions are extremely confusing and conflicting; so much so that the Circuit Court of Appeals says, in its opinion in this case, that "it is impossible to reconcile them with each other." But the great weight of authority is, as petitioner most respectfully submits, against the view taken by the Circuit Court of Appeals in its opinion in this case.

Petitioner confidently believes that it is impossible to distinguish this case in principle from that of Bedford v. Eastern Building and Loan Association, decided by this Honorable Court on April 22nd, 1901, a few days after the decision of this case by the Circuit Court of Appeals, and reported in 181

U. S. 227. The principle decided in that case, as petitioner understands it, was that the appellant's subscription to stock in the association, having been made prior to the passage of the statutes relied on as a defense, was not affected or rendered void by those statutes; and that by virtue of his stock subscription, appellant became entitled to exact performance of the requirements of the by-laws and charter of the association, and therefore acquired a vested right to a loan, which loan it was the duty of the association to make, and which the legislature had not the power to forbid.

In the present case, the appellant Denson became a member and stockholder in petitioner, not through any doing of business by petitioner in the State of Alabama, but by the issuance of stock to him in the State of Tennessee. Having, then, become a stockholder in petitioner by a lawful and unimpeachable transaction, said Denson became legally entitled to obtain a loan whenever the requisite conditions existed; and this was a vested right, which he could have enforced against petitioner and therefore "it was properly yielded to without suit and possessed all legal sanctions." In its petition to rehear in this case, petitioner cited and relied on the opinion of this Honorable Court in the Bedford case aforesaid; but as the Court of Appeals filed no opinion, in dismissing the petition to rehear, petitioner is unable to say what view that Court took of the Bedford case, or on what ground it distinguished that case from this one.

As further evidence of the conflict of opinion on the questions involved in this case, and of the weight of authority against the opinion of the said Circuit Court of Appeals, petitioner respectfully calls the attention of this Honorable Court to the fact that the opinion of the Hon. E. S. Hammond, District Judge, in the case of Eastern Building & Loan Association v. Bedford, the same case decided by this Court on April 22nd, 1901, as hereinbefore set forth, is hopelessly in conflict with the opinion of the Court of Appeals in this case; that the learned Judge who tried this cause in the Circuit Court was of the opinion that petitioner was entitled to recover, notwithstanding the laws relied on; that the Hon. William Lochren, in the Circuit Court for the District of Minnesota, in an opinion in the case of Sullivan v. Sheehan, reported in 89 Fed. Rep. 247, held that statutory provisions similar to those involved in this case did not apply to or invalidate a contract such as is here presented; that the Supreme Court of North Dakota, in the case of United States Savings and Loan Co. v. Shain, 8 North Dakota, 136, has announced an opinion sustaining the contention of petitioner in this case, and wholly at variance with the said opinion of the Circuit Court of Appeals; that the Hon. Charles H. Simonton, in the case of Guaranty Savings, Loan & Investment Co. v. Alexander, in the Circuit Court for the District of South Carolina, in an opinion reported in 96 Fed. Rep. 870,

has also held in accordance with petitioner's contention; and that the Circuit Court of Appeals for the Sixth Circuit was in such doubt, and deemed the questions of such importance and gravity, that it certified to this Honorable Court in the said case of Bedford v. Eastern Building & Loan Association, the identical questions upon the determination of which this case depends.

And petitioner most respectfully submits, further, that the opinion of this Honorable Court in Allgeyer v. Louisiana, 165 U. S. 578, is conclusive of the questions on which this case must be determined. If, as held in that case, a citizen of a State has a right, of which the State government cannot deprive him, to make a contract outside the State, with residents of other States, while he himself remains in the State of his domicile, then it is most earnestly contended that the contract involved in this case was one which the parties had the right to make, and which the State of Alabama could not forbid.

Wherefore your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said cause therein entitled William H. Denson and Rosa E. Denson, plaintiffs in error, *versus* Chattanooga National Building & Loan Association, defendant in error, being No. 1028 on the docket of said Court, to the end that said cause may be reviewed and determined by this Court, as provided in Section Six of the Act of Congress hereinbefore cited and referred to; or that petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate, and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION,

By PRITCHARD & SIZER,
Attorneys, Solicitors and Counsellors for Petitioner.

ROBERT PRITCHARD,
J. B. SIZER,
Of Counsel for Petitioner.

STATE OF TENNESSEE, }
HAMILTON COUNTY. } ss.

J. B. Sizer, being duly sworn, says that he is one of the attorneys and solicitors and of counsel for Chattanooga National Building & Loan Association, the petitioner above named, and as such had personal charge for petitioner of the case in the foregoing petition mentioned, in the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, and in the United States Circuit Court of Appeals for the Fifth Circuit; that he has read the said petition; and that the facts therein stated are true to the best of his information and belief.

J. B. SIZER.

Sworn to and subscribed before me this 29th day day of November, 1901.

NORRIS HEADRICK,
Notary Public.

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